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PACIFIC TELESIS
Group-Washington

April 25, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, DC 20554

Dear Mr. Caton:

Re: CC Docket No. 96-61, In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace and Implementation of Section 254(g) of the Communications Act of 1934, as Amended

On behalf of Pacific Telesis Group, please find enclosed an original and six copies of its "Comments" in the above referenced proceeding. Under separate cover, a paper copy of these comments as well as the comments on diskette have been sent directly to Ms. Janice Myles of the Common Carrier Bureau.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Enclosure

CC: Janice Myles

Jay Bennett
Director
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PACIFIC TELESIS
Group-Washington

April 25, 1996

Ms. Janice Myles
Federal Communications Commission
Common Carrier Bureau
1919 M Street, N.W., Room 544
Washington, DC 20554

Dear Ms. Myles:

Re: CC Docket No. 96-61, In the Matter of Policy and Rules Concerning the Interstate Interexchange Marketplace and Implementation of Section 254(g) of the Communications Act of 1934, as Amended

On behalf of Pacific Telesis Group, please find enclosed a paper copy of its comments in the above referenced proceeding, and a copy of the comments on diskette as specified in Paragraph 117 in the Notice of Proposed Rulemaking.

Should you have any questions, or wish to discuss this matter further, please feel free to call me.

Sincerely,

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	
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COMMENTS OF PACIFIC TELESIS GROUP

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April 25, 1996

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Summary

The Commission should forbear from tariff regulation through a policy of permissive detariffing. Permissive detariffing is the most deregulatory alternative, and would allow carriers to provide interstate, interexchange service, particularly to mass market customers, flexibly and efficiently.

In addition, the surest remedy to suspected tacit price collusion is prompt entry of new competitors. The Commission should move swiftly to ensure that the Bell companies may enter the interstate, interexchange market on a nondominant basis.

IXCs should be allowed to bundle customer premises equipment with interLATA services, so long as the interstate, interexchange service is also available separately. However, IXCs should not be required to offer CPE separately.

Finally, the Commission should not modify its tariff enforcement policies, although it should require carriers to provide a reasonable notice period of tariff filings that would modify the terms of negotiated service agreements.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	
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COMMENTS OF PACIFIC TELESIS GROUP

Pacific Telesis Group hereby respectfully files these comments in response to the Commission's *Notice of Proposed Rulemaking* ("*Notice*") in the above-captioned proceeding.[1] In the *Notice*, the Commission solicits comment on a number of issues relating to regulation of interstate, interexchange telecommunications, and segregates the issues into two separate comment cycles. These comments address the issues discussed in Sections III (tariff forbearance), VII (tacit price collusion), and VIII (bundling), and IX (other tariff-related issues) of the *Notice*.[2]

The Commission should move aggressively to promote competition in interstate, interexchange services by removing regulatory impediments to full Bell company participation. In this proceeding, the Commission should:

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[1] FCC 96-123 (released March 25, 1996, *summary published*, 61 *Fed. Reg.* 14,717 (April 3, 1996).

[2] Comments on the other issues in the *Notice* were filed on April 19, 1996.

- adopt a policy of permissive tariff forbearance to protect customers by allowing certainty in the service relationship and to allow carriers flexibility to offer services in the manner they believe best;

- recognize that prompt Bell company entry into the interLATA market offers the best hope for preventing tacit pricing collusion;

- allow carriers to bundle customer premises equipment with interLATA services, so long as the bundled telecommunications service is also available a la carte; and

- modify current tariffing regulations only to the extent of generally requiring carriers that provide facilities used for resale services to file any tariff changes on at least several days advance notice.

I. THE COMMISSION SHOULD ADOPT A POLICY OF PERMISSIVE TARIFF FORBEARANCE

Section 203 of the Communications Act provides that telecommunications common carriers "shall" file tariffs with the Commission establishing the rates, terms, and conditions by which they offer service. However, new Section 10(a) of the Communications Act[3] provides that, if certain conditions are specified, the Commission "shall" forbear from enforcing, with limited exceptions, any statutory provision or regulation applicable to common carriers. Relying upon Section 10(a), the *Notice* tentatively proposes to forbear from enforcing the Section 203 tariffing requirement currently applicable to interexchange carriers ("IXCs"). The *Notice* further tentatively proposes to *forbid* carriers from filing tariffs (mandatory detariffing).

We agree that the Commission should "forbear" from enforcing Section 203(a) as to

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[3] 1996 Act, § 401, *to be codified at* 47 U.S.C. § 10(a).

nondominant carriers, including Pacific Bell Communications ("PB Com"), our interLATA subsidiary. This means that the Commission should not sanction carriers that do not choose to file tariffs. However, we respectfully submit that a policy of mandatory detariffing would not be in the public interest. Carriers should have the flexibility to offer services by tariff where that is the most efficient means of providing service. Therefore, we urge the Commission to adopt a policy of permissive detariffing only.

Section 10(a) of the Communications Act, as amended, provides that the Commission shall forbear from applying certain statutory or regulatory provisions if three conditions are satisfied: (1) that enforcement of a particular provision is not "necessary" to ensure that charges, practices, or classifications are just, reasonable, and not unreasonably discriminatory; (2) that enforcement is not "necessary" for the protection of consumers; and (3) that forbearing from enforcement "is consistent" with the public interest. The Commission tentatively concludes that these three conditions are met in the case of tariffing by nondominant IXCs, and accordingly proposes to forbear from continued enforcement of the Section 203 tariffing requirement.[4]

The three statutory conditions appear to be met, particularly in the case of negotiated service arrangements. Experience obtained during the years the Commission previously applied tariff forbearance suggests that requiring carriers to file tariffs, while helpful, is not

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[4] As Pacific Telesis has previously explained, it intends to offer interLATA service through Pacific Bell Communications ("PB Com"), an affiliate separated from Pacific Bell and Nevada Bell as required by Section 272, which should be treated as non-dominant. *See Comments of Pacific Telesis Group*, CC Docket No. 96-61 (April 19, 1996).

"necessary" to ensure that rates of nondominant IXCs are just, reasonable, and nondiscriminatory so long as the market is competitive. As discussed below, the Commission's legitimate concerns about a pattern of tacit collusion over the years in the interexchange market suggests that the marketplace is not fully competitive. This makes entry by the Bell companies even more urgent.

The second finding required by Section 10 in this context is that enforcement of the tariff requirement is not "necessary" for the protection of consumers. The *Notice* suggests that tariffs harm consumers by undermining vigorous rate competition.[5] We agree that there is evidence that the interstate, interexchange market may have been marked in recent years by price collusion.[6] At the same time, it is not entirely evident that the tariffing process is to blame. For example, in the mass market, the largest IXCs exchange pricing information through widespread advertising at least as much as through tariffing. In addition, the *Notice* ignores the possibility that consumers may benefit from the presence in tariffs of a statement of the terms and conditions of the subscriber relationship.[7] While large, sophisticated

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[5] *Notice*, ¶ 29.

[6] *See* Section III, *infra*.

[7] Tariffs typically give customers specific rights, such as credits or refunds in certain circumstances, as well as obligations. There is no basis for a concern that non-dominant IXCs would impose onerous terms, for the Commission has held that, as a matter of law, non-dominant carriers cannot impose unreasonable terms and conditions on their subscribers. *Competitive Carrier Proceeding*, 85 F.C.C.2d 1, 31 (1980) (First Report and Order) ("a non-dominant competitive firm . . . will be incapable of violating the just and reasonable standards of 201(b)" and "cannot rationally engage in the type of unlawful discrimination condemned by Section 202(a)"); *see also Competition in the Interexchange Marketplace*, 6 FCC Rcd 5880, 5903 (1991).

customers typically negotiate their own "protections," mass market customers typically must rely on a tariff.

The third determination required by Section 10 is that forbearance is "consistent with the public interest." We agree with the *Notice* that forbearance can promote competition[8] and that the Commission should no longer enforce the tariffing obligation against nondominant IXCs.

II. THE PUBLIC INTEREST WOULD BE BEST SERVED BY A POLICY OF PERMISSIVE DETARIFFING

Even assuming that the Commission now has the legal power to mandate detariffing, the public interest would be best served by a policy of permissive detariffing. Permissive detariffing would promote competition by lowering transactions costs in many customer contexts, especially for newly entering IXCs, and would allow both subscribers and carriers to benefit from the certainty in the business relationship that a tariff can establish. Perhaps most importantly, permissive detariffing policy would be the most deregulatory policy because it would allow private businesses, rather than government regulators, to determine how best to structure their offerings and compete in the marketplace. These reasons more than offset the concerns about price and related harms allegedly associated with tariffing and on which the *Notice* primarily focuses.

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[8] *Notice*, ¶ 30.

First, the *Notice* completely ignores the fact that tariffing can actually reduce, rather than increase, transactions costs. This is especially likely in the case of mass market services, where often a subscriber selects carrier with no negotiation at all. Indeed, in the typical case of a residential user selecting a 1+ presubscription carrier, the "contact" is not with an IXC at all, but with the local carrier. Other residential users enter into a business relationship with a carrier through 10XXX dialing or debit cards, relationships also typically involving no actual contact between customer and carrier.[9] In these situations, tariffing facilitates this process for all concerned by establishing the terms and conditions of service, thereby eliminating the burdensome paperwork associated with handling subscription agreements.[10]

There is no reason for concern that nondominant IXCs will impose onerous "hidden" terms if allowed to file tariffs. The Commission long ago determined that, as a matter of law, nondominant carriers have no ability to impose unjust or unreasonable terms,

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[9] We are aware, of course, that mandatory detariffing is the current policy in the cellular service. However, the interexchange market differs from the cellular market. First, the interexchange market, especially for wireline customers, is very much larger. The sheer size of the wireline market would make individual service negotiations a virtual impossibility, and serve only to entrench even further the current IXC oligopoly. Second, a new cellular customer typically does in fact have a face-to-face contact with a sales representative who provides a written service agreement at the time that the CPE is acquired. The wireline market simply does not operate in such a fashion.

[10] These transaction costs are as potentially substantial for PB Com, a structurally separate interLATA carrier, as for any other new entrant with no market share.

conditions, or rates, and that they cannot rationally discriminate.[11] Moreover, filed tariffs would provide a public basis for comparison of terms as well as of rates.

Second, a tariff can establish a level of certainty in the carrier/subscriber relationship that would not exist under mandatory detariffing. A tariff presents, in one convenient place subject to the jurisdiction of this Commission, the terms and conditions of service. If tariffs could not be filed, however, disputes between subscribers and carriers could become a matter of litigation in every State in the nation. Any dispute could result in litigation regarding the validity of terms and conditions that, under the *Notice*'s proposal, the carrier otherwise would never make publicly available. Each court could then assess the reasonableness of a particular term, potentially resulting in a confusing and possibly inconsistent patchwork of law across the nation. The potential costs of this process would pose a substantial hurdle to new entrants, such as PB Com, that not have a large and entrenched customer base.

Third, permissive detariffing is the most deregulatory of all the choices facing the Commission, and therefore is the most consistent with the 1996 Act. Permissive detariffing would promote competition by allowing carriers, not regulators, to choose how to structure their offerings and compete in the marketplace. If filing tariffs is competitively beneficial, then nondominant IXCs should be allowed to file. If tariffs prove to be burdensome and hamper competitive responses, then nondominant IXCs should be free to cancel them. New

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[11] *See Competitive Carrier Proceeding*, 80 F.C.C.2d 1, 32 (1980) (First Report and Order).

entrants, such as PB Com, should enjoy the maximum flexibility permitted by law in structuring their service offerings.

These public interest benefits outweigh the concerns about rates that are the exclusive focus of discussion in the *Notice*. In particular, Paragraph 30 of the *Notice* reiterates the Sixth Report and Order's findings that requiring nondominant carriers to file tariffs (1) impedes their ability to respond rapidly to changes in costs and demand, (2) removes incentives for competitive price discounting, and (3) imposes additional costs on new offerings. However, mandatory detariffing is unnecessary to achieve the goals identified.

The rapidity of response is a function of the notice period, not tariffing *per se*. The current one-day notice period for nondominant IXC tariff filings, which was adopted after the Sixth Report and Order in the *Competitive Carrier Proceeding*, alleviates this concern still further.[12] Second, recent advertising campaigns by both the major and smaller IXCs over the past few years belies the notion that tariffing necessarily impedes price discounting. While the rates charged by AT&T, MCI, and other IXCs remain excessive, there can be little dispute that they advertise discount plans heavily. Finally, administrative costs associated with new offerings are relatively minor when the tariff can be filed, as is currently the case for nondominant IXCs, on short notice, with a presumption of lawfulness, and without cost support. Indeed, as noted above, administrative costs may be *higher* absent a tariff.

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[12] *See Tariff Filing Requirements for Nondominant Common Carriers*, FCC 93-401 (released Aug. 18, 1993), *summary published* 58 *Fed. Reg.* 44,457 (Aug. 23, 1993).

For these reasons, we believe that the potential public interest benefits from permissive detariffing outweigh the harms that the *Notice* alleges tariffs cause. As the next section discusses, concerns about price collusion have their origin in the market structure of the interstate, interexchange industry, not in tariffs.

III. THE BEST REMEDY FOR POSSIBLE TACIT PRICE COLLUSION IS PROMPT BOC INTERLATA ENTRY

The *Notice* invites comment on allegations of tacit price collusion by the large IXCs, also aired previously in the *AT&T Nondominance* proceeding.[13] At that time, the Commission concluded that "evidence in the record is conflicting and inconclusive as to the issue of tacit price coordination among AT&T, MCI, and Sprint with respect to basic schedule rates or residential rates in general."[14] The Commission also concluded that the problem was generic to the industry and would better be addressed "by removing regulatory requirements that may have facilitated such conduct."[15] Accordingly, it reclassified AT&T as nondominant, allowing it to file tariffs on shorter notice.

Revisiting these issues, the *Notice* states that the 1996 Act provides the best solution to any problem of tacit price coordination, to the extent that it exists, "by allowing for competitive entry in the interstate interexchange market by the facilities-based BOCs and

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[13] *Notice*, ¶ 81, *citing Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, FCC 95-427 ¶¶ 81-83 (Oct. 23, 1995).

[14] *Id.*, ¶ 83.

[15] *Id.*

others."[16] While we believe that the evidence of tacit price collusion, especially in the area of residential services, is strong, we also agree that BOC entry into the in-region interLATA market offers the best hope for eliminating collusion.

Tacit price collusion, or conscious price parallelism, can occur whether or not tariffs are filed. The incumbent carriers can readily signal pricing information through widespread advertising without needing to review each other's tariffs. This is particularly true where a market exhibits oligopolistic characteristics, as the interstate, interexchange market does today. Mandatory detariffing (which, as noted above, the Commission lacks power to order) would treat a symptom, not a cause, and thus is insufficient to remedy the problem.

We respectfully submit that the only reliable remedy is the introduction of additional facilities-based competition from experienced communications providers. Congress agrees. Section 271 of the Act contemplates the entry of precisely such competition. Thus, the most effective way in which the Commission can act to prevent tacit price collusion is to take actions that will allow Bell company entry into the in-region interLATA market on a nondominant basis as soon as possible.

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[16] *Id.*, ¶ 81.

IV. CARRIERS SHOULD BE ALLOWED TO BUNDLE OFFERINGS OF CUSTOMER PREMISES EQUIPMENT WITH INTEREXCHANGE SERVICES, SO LONG AS THE TELECOMMUNICATIONS SERVICE IS ALSO AVAILABLE ON AN UNBUNDLED BASIS

Since 1980, the Commission has prohibited carriers from bundling the provision of customer premises equipment ("CPE") with interstate telecommunications services.[17] Citing changed circumstances in both the CPE and telecommunications markets, the *Notice* proposes to allow modify this prohibition to the extent of allowing nondominant IXCs to bundle interstate, interexchange services with CPE.[18]

We support allowing nondominant IXCs to bundle CPE with their interstate, interexchange services. However, the Commission should require IXCs that offer such bundled sales packages also to offer the interexchange service separately on an unbundled, nondiscriminatory basis as well.

As the *Notice* suggests, a separate unbundled offering may be required under the Uruguay Round Agreements of the General Agreement on Tariffs and Trade. In addition, however, requiring carriers to make an *a la carte* offering of interstate, interexchange services would be consistent with the Commission's resale requirements.[19]

The unbundling requirement should extend only to the interexchange component of

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[17] *Id.*, ¶ 84; 47 C.F.R.§ 64.702(e).

[18] *Notice*, ¶ 88. The *Notice* observes that the market for CPE is now regarded as fully competitive, while the interstate, interexchange services market is "substantially competitive."

[19] Commission policy generally requires interstate carriers to make their services available for resale. *See Resale and Shared Use*, 83 F.C.C.2d 167 (1980).

the sales package. IXCs should be under no obligation to provide CPE on a standalone basis. Furthermore, since the provision of CPE is not regulated, directing IXCs to offer CPE would require a significant reversal of longstanding Commission policy.

V. FEW CHANGES ARE NEEDED TO THE FILED RATE DOCTRINE AND ESTABLISHED PRECEDENT REGARDING TARIFF CHANGES

Section IX of the *Notice* seeks comment regarding certain aspects of tariff regulation.[20] We believe that no change in existing law is required, other than an expansion of the notice period for tariff changes that would alter the terms of negotiated contracts.

The *Notice* correctly notes that problems may occur where carriers seek, through tariff filings, to supersede the terms of a negotiated service arrangement. This issue was recently aired in the *AT&T Nondominance* proceeding, and is a matter of ongoing concern that it is appropriate for the Commission to consider in this proceeding. As PB Com will be using leased facilities in its provision of interstate, interexchange services, it will be affected if carriers that provide its underlying facilities attempt to alter the rates and terms of their service agreements with PB Com through tariff amendments.[21] Such changes could prove

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[20] *Notice*, ¶¶ 92-100. We agree that most of these questions would become moot if mandatory forbearance becomes the rule.

[21] Contracts between carriers need not be tariffed at all. 47 U.S.C. § 211. In response to the *Notice*, we see no reason to modify the current "public interest" standard applicable to tariff amendments by carriers that would modify the terms of a negotiated carrier-to-carrier contract. *See Notice*, ¶ 97, *citing United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

disruptive to interstate, interexchange competition, and the Commission's review is appropriate.

The biggest problem in the current treatment of contract tariffs is the ability of the carriers to change the rates and terms on one day's notice. As the *Notice* states, this abbreviated period "effectively precludes customers from challenging such revisions before they become effective."[22] While nondominant carriers may not have the market power to sustain unreasonable rates or conditions of service, a one day notice period may be unreasonably brief insofar as it applies to a tariff embodying a service contract.[23] Accordingly, we recommend that, where a tariff filing will amend or supersede a contract, that customers should receive at least several days advance notice before the effective date, in order to provide a more reasonable opportunity to respond.[24]

CONCLUSION

The policies established in this proceeding will likely govern the provision of interstate, interexchange services for years to come. For the reasons stated in these comments, the Commission should adopt a policy of permissive detariffing for nondominant

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[22] *Notice*, ¶ 99.

[23] The "substantial cause" test applies to the contract-based tariffs of nondominant carriers. *See Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562, 4574 (1995).

[24] Parties to service agreements often negotiate certain protections, such as advance notice of likely changes. These may provide the customer with a contractual remedy outside of the tariff context, but does not affect the validity of the tariff itself.

interstate, interexchange carriers. Tariffing offers substantial public benefits, particularly insofar as it would facilitate new entry. New entry, such as that authorized by Section 271 of the Act, offers the best hope of eliminating any danger of tacit price collusion in the interstate, interexchange marketplace.

Respectfully submitted,

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